No. 16,032

In the

United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

FERNANDO S. FORFARI,
Appellee.

Appellee's Reply Brief

ERNEST E. EMMONS, JR.
THOMAS M. MULVIHILL
1095 Market Street
San Francisco 3, California
Attorneys for Appellee

PARKER PRINTING COMPANY, 180 FIRST STREET, SAN FRANCISCO 5

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STATEMENT OF FACTS

On November 21, 1951, there was in existence, at the Mare Island Naval Yard, Vallejo, California, an organization known as the Commissioned Officers' Club, a purely social club, having no government or naval function. This club was housed in a building owned by the Navy, for which the club paid no rent. Maintenance and repairs to this building were by the Navy. All other expenses including utilities were paid for by the club members. The club employed six people, a manager, a janitor and four office workers, whose salaries were paid by the club from its own revenues. The club carried liability insurance for the protection of its members from civil liability arising from the operation of the club's activities. The building had a kitchen and dining room; meals for members were prepared in the kitchen.

Sometime prior to November 21, 1951, the Commissioned Officers Club had entered into a contract in writing with the Mare Island Cafeteria System to provide the food for its members in its dining room, including all necessary employees to accomplish this, using the club's kitchen for cooking and preparing meals. These employees were not employees of the Commissioned Officers Club but were employed and paid by the Mare Island Cafeteria System.

The Mare Island Cafeteria System was organized pursuant to U. S. Naval Regulations for the purpose of supplying hot food to Mare Island Naval Yard employees, mostly civil. It was operated and managed by a civilian manager who looked to a Board of Directors, civilians, and ultimately to the Commandant of the Naval Yard for determination of final authority.

To carry out this purpose the Mare Island Cafeteria System maintained one control kitchen where the food was cooked, prepared and distributed to four cafeterias and eight canteens.

Prior to the date in question, the Mare Island Cafeteria System took out a policy of Workmen's Compensation Insurance with the State Compensation Insurance Fund of the State of California providing employer liability insurance and compensation insurance for its employees.

It is admitted by the Government that both the Commissioned Officers Club and the Mare Island Cafeteria System were non-appropriated fund functions on the date in question.

Plaintiff, some time prior to November 21, 1951, was employed by and paid by the Mare Island Cafeteria System as a chef, working in the kitchen in the building occupied by the Commissioned Officers Club.

On the day in question, plaintiff had not reported for work, and before changing clothes to start work went up

some stairs leading from the kitchen to a lavatory. There were nine steps approximately 40 inches wide enclosed by a wall on both sides. There was no handrail on either side of the stairs which were fairly steep. The steps were painted or were covered with linoleum and had a metal strip across the front of each step which raised above the level of the step a distance of 1/10th to 1/4th of an inch approximately. There was no light on the stairway but there was an electric light in the hall at the head of the stairs in the upper hallway.

Plaintiff, before this date walked with a limp, having injured his left hip in a previous accident some years before which resulted in this disability.

On the day in question, leaving the lavatory, plaintiff, with his back to the light in the hallway, started to descend this stairway; stepping on the second step, his left heel caught on the metal strip across the front of the step and caused him to fall forward and down to the bottom of the stairs, thereby receiving serious personal injuries.

Prior to this accident, the manager of the Commissioned Officers Club spent all of his working hours in the building supervising the club's activities, its maintenance, care and inspection for possible need for repair or defects; the janitor employee of the club took daily care of the stairs in question and lived in a room adjacent to the lavatory at the head of the stairs; defects and need for repairs were reported to the Navy's department of public works for attention.

The Government voluntarily admits that shortly after this accident a handrail was installed by the Navy extending down the right hand wall when descending. Defendant's exhibit "A" photograph does not show this as the picture is taken at an angle to avoid it showing.

SUMMARY OF APPELLANT'S ARGUMENTS ON APPEAL

Appellant's main argument urged in support of reversing this judgment in appellee's favor is simply stated: appellee is an employee of the United States, and as such, is (1) precluded from suing under the Federal Tort Claims Act, or (2) if allowed to sue thereunder, would be barred from recovery under local state law. Although appellant has specified four errors allegedly committed by the court below, the four are really reduced to one: that the District Court erred in finding the appellee was not an employee of the United States. Specifications of error 2, 3, and 4 flow naturally from, and are premised upon, the correctness of alleged error number 1: that appellee is an employee of the United States. If it is determined that appellee is not an employee of the government, as found by the court below, then appellee can sue under the Federal Tort Claims Act, and appellant would be liable under California law.

ARGUMENT IN SUPPORT OF THE JUDGMENT

I. The District Court Correctly Held That Appellee Is Not an Employee of the United States.

A. THE CASE AUTHORITY HAS UNIFORMLY HELD THAT AN EMPLOYEE OF A NON-APPROPRIATED FUND ACTIVITY (1) IS NOT AN EMPLOYEE OF THE UNITED STATES, AND (2) MAY MAINTAIN SUIT UNDER THE FEDERAL TORT CLAIMS ACT AGAINST THE UNITED STATES.

It is appellant's contention that since appellee is a civilian employee of a non-appropriated fund activity, which is a "federal instrumentality", "it follows necessarily that he must be considered to be an employee of the United States". (Appellant's Brief, page 10). However, even though the Mare Island Cafeteria System is a non-appropriated fund activity and a "federal instrumentality", appellant's conclusion does not necessarily follow. In fact it completely ignores *Faleni v. United States,* 125 F.Supp. 639 (E.D. N.Y.

1949), where the District Court, in denying the government's motion to dismiss, squarely held that the plaintiff, employed as a civilian laundry worker by the Ship's Service Department, also a non-appropriated fund activity, *was not an employee of the United States.* The court clearly rejected the argument advanced by the government that since the Ship's Service Department was an instrumentality of the United States it necessarily followed that an employee-employer relationship existed between the plaintiff and the government. See *Roger v. Elrod,* 125 F. Supp. 62 (D.C. Alaska, 1954), where the court, in distinguishing *Faleni v. United States,* supra, stated at pages 63 and 64 that "in the Faleni case, the plaintiff was a civilian and clearly served only in the capacity of employee of the Ship's Service Department". In *Grant v. United States,* 162 F. Supp. 689 (E.D. N.Y., 1958), the court, in explaining *Faleni v. United States,* supra, stated that if Mrs. Rooney, a civilian employee of the Ship's Service Store of the Merchant Marine Academy (a non-appropriated fund activity), "were suing the defendant to recover damages for an injury attributable to her employer, the decision would constitute an authority to the effect that no recovery could be had by her against the United States" (at page 693). This conclusion resulted from the fact that if Mrs. Rooney were injured by "her employer", who was the non-appropriated fund instrumentality of the federal government, it naturally followed that the United States, who was *not* "her employer", would incur no liability thereby. Thus, it is readily apparent that *every court which has considered the question has concluded that an employee of a non-appropriated fund activity, even though a federal instrumentality, is not an employee of the United States.*

In fact, *the government has recently acknowledged that an employee of a non-appropriated fund activity is not an*

employee of the United States. In *Aubrey v. United States,* 254 F.2d 768 (D.C. Cir., 1958), even though the government stipulated that the plaintiff husband, *a civilian employee of the Officers Mess* (a non-appropriated fund activity), was not an employee of the United States, the court granted the government's motion for summary judgment *as to the husband* on the ground that the remedy provided in 5 U.S.C. 150k-1 was his exclusive remedy. However, the court denied the government's motion as to the plaintiff wife who sought damages for loss of consortium due to the husband's injury. Since the government had stipulated that the husband was not an employee of the United States, the court held that *Smither & Co. v. Coles,* 242 F.2d 220 (D.C. Cir., 1957), did not preclude the wife's claim. In *Smither & Co. v. Coles,* supra, the court held that a wife could not sue her husband's employer for loss of consortium as the Workmen's Compensation Act was intended as the employer's exclusive liability.

At first blush it might be thought that *Daniels v. Chanute Air Force Base Exchange,* 127 F. Supp. 920 (E.D. Ill., 1955) is inconsistent with or reached a contrary conclusion to appellee's position herein and to the cases already cited and relied upon by appellee. However, the court in *Daniels,* supra, held that the plaintiff, a civilian employee of the Exchange (a non-appropriated fund activity), *was not an employee of the federal government for purposes of the Federal Tort Claims Act.*

Appellant argues that both the *Faleni* case and the *Daniels* case "ignore the considerations which we set forth here". (Appellant's Brief, page 13, footnote 5). What new considerations have appellants set forth here? Obviously none which were not fully considered and rejected by the cases relied upon by appellee. It is evident from appellant's brief (pages 7-14) that the government's new consideration

is the fact that the Cafeteria System is a "federal instrumentality" (*Nimro v. Davis,* 204 F.2d 735 (D.C. Cir., 1953); Act of June 19, 1952, 66 Stat. 138, 5 U.S.C. 150k); and therefore its employees are necessarily government employees. However, as appellee has already pointed out, the court in *Faleni v. United States,* 125 F. Supp. 630 (E.D. N.Y., 1949), expressly rejected this argument which was also advanced therein by the United States. The court, after assuming that a non-appropriated fund activity is a federal instrumentality, nevertheless held that *a civilian employee of such an activity could sue under the Federal Tort Claims Act since he was not an employee of the United States.*

Furthermore, the *Congressional intent* expressed in 5 U.S.C. 150 clearly indicates that *employees of non-appropriated fund activities are not federal employees even though such activities are federal instrumentalities.* In order to allay doubts created by *Standard Oil Co. v. Johnson,* 316 U.S. 481, Congress enacted 5 U.S.C. 150k (66 Stat. 138, 1952) specifically providing that employees of such activities are not federal employees for purposes of the Federal Employees' Compensation Act or the Federal Civil Service Act. *Aubrey v. United States,* 254 F.2d 768 (D. C. Cir., 1958). Congress, at the same time it declared employees, such as appellee, not to be federal employees, retained the sovereign privileges and immunities of such activities. Thus, it is clear that *Standard Oil Co. v. Johnson,* 316 U.S. 481, relied upon so heavily by appellant, is inapplicable since the Congressional intent shows clearly that appellee is not a federal employee.

The meaning of "employee of the United States" within the meaning of the Federal Tort Claims Act is well illustrated by *Comelin v. United States,* 177 F.2d 275 (5th Cir.,

1949). In that case the court held that a federal judge and a trustee in bankruptcy were not federal employees within the meaning of the Tort Claims Act. This holding was reached even though the federal judiciary is expressly created by the United States Constitution, the members thereof are appointed by the President and confirmed by the Senate, and their salaries are paid out of the United States Treasury. The facts in this case bring appellee squarely within the rule of *Comelin v. United States,* supra. It is clear under the facts adduced herein that employees of non-appropriated fund activities are no more subject to control by the appellant than are federal judges, and should not be considered as employees within the meaning of the Tort Claims Act.

It is interesting to consider what the appellant's position would be with respect to appellee's employment status if the United States were sued by a third party for injuries caused by appellee's negligence. As a result of the enactment of 5 U.S.C. 150k-1, appellee would be precluded from suing the government under the Federal Tort Claims Act. Appellee's sole remedy for tortious injury would be as provided in 5 U.S.C. 150k-1. *Aubrey v. United States,* 254 F.2d 768 (D.C. Cir., 1958). Thus, it is clear that the United States, in attempting to avoid liability in such a suit, would argue that no employee-employer relationship existed between it and appellee. Appellee asserts that the government should not be permitted to adopt such opposed, inconsistent views from case to case.

B. THE APPLICATION OF ACCEPTED COMMON LAW PRINCIPLES USED IN DETERMINING THE EXISTENCE OF AN ALLEGED EMPLOYEE-EMPLOYER STATUS REVEALS (1) THAT APPELLEE WAS NOT AN EMPLOYEE OF, NOR EMPLOYED BY THE UNITED STATES, AND (2) THE APPELLANT HAS FAILED TO ASSUME THE BURDEN OF PROOF REQUIRED OF IT.

If the Court does not agree with the contentions and authorities in A, supra, appellee then contends that accepted common law principles used in testing the existence of an alleged employee-employer relationship are applicable, and such principles, under the facts of this case, reveal that no employment relationship existed between appellee and appellant. At common law, four elements are used to determine whether an employment status exists: (1) the selection and hiring of the employee; (2) the payment of the employee's wages; (3) the power to dismiss the employee; and (4) the right to control the means and methods by which the employee shall perform the work, as well as the end result. *Matcovich v. Anglim*, 134 F.2d 834 (9th Cir., 1943). The United States has not undertaken to prove, as it has the burden of doing, the existence of these elements. It is appellee's contention that not one of the four elements constituting the employment status could possibly or does exist in this case.

1. The Selection and Hiring of Appellee Was Not Done by Nor on Behalf of the United States.

It is elementary that the employee-employer status can arise only if there is an express or implied consensual or contractual agreement between the parties. See *Benway v. Missouri-Kansas-Texas R. Co.*, 26 F.2d 383; *Fleming v. A. H. Belo Corp.*, 121 F.2d 207, aff. *Walling v. A. H. Belo Corp.*, 316 U.S. 624, reh. den. 317 U.S. 706.

In this case, the facts do not disclose, nor has appellant attempted to prove that a contract existed between appellee and the defendant. The only evidence bearing on the rela-

tionship of the United States to contracts entered into by the Cafeteria System is as follows: Appellee testified without contradiction that he was employed by the Cafeteria System (Transcript page 5, lines 20-23). There is no evidence indicating that the contract of employment was other than between appellee and the Cafeteria System. Further, the testimony of Mr. Dale Sexton, the civilian manager of the Officers Club at the time of the injury, reveals that all of the contracting for the services performed by the Cafeteria System was done only with and by the System, and not by the United States. Mr. Sexton testified on cross-examination that the Officers Club had a contract with the Cafeteria System whereby the latter supplied kitchen workers and food to the former (Transcript, page 27, lines 18-23). Mr. Sexton "had nothing to do with those employees and food" (Transcript, page 36, lines 24 and 25). This is because the employees of the Cafeteria System were under the control and supervision of the civilian manager employed by the Cafeteria to supervise its function.

It is clear that as a matter of law the United States could not enter into a contract with appellee: appellee's contract of employment could not legally have been the contract of the United States. In *Pulaski Cab Co. v. United States,* 157 F. Supp. 955 (Ct. Cl., 1958), the court, in upholding the validity of a Department of the Army Regulation providing that "contracts involving Exchanges are not government contracts", stated that this regulation "follows naturally from the fact that the operation of the Post Exchange is carried on from non-appropriated funds" (at page 957). In *Bleueri v. United States,* 117 F. Supp. 509 (D.C. So. C., 1950), the plaintiff, the former manager of the Marine Corps Officers Open Mess, sued the government for breach of the contract of employment. The court held that the plaintiff could not sue the United States for breach of a contract

made with a non-appropriated fund activity. In *Edelstein v. South Post Officers Club,* 118 F. Supp. 40 (D.C. Va., 1951), the court held that *a contract made by the Officers Club was not an obligation of the United States, but solely a liability of the Club, a non-appropriated fund activity.* In *Borden v. United States,* 116 F. Supp. 873 (Ct. Cl., 1953), the court held that the plaintiff, a former civilian chief accountant of a Post Exchange, could not sue the government on an employment contract with the Exchange, a non-appropriated fund activity. Since appellant can not be held liable on contracts executed by non-appropriated fund activities, the only reasonable conclusion that can be drawn from the above cases is that no contract existed or could exist between the appellee and appellant.

Thus, appellee asserts that the District Court properly held that the United States was not appellee's employer either (1) upon the ground that the appellant failed to prove such relationship, as it had the burden of doing, or (2) on the basis of the *Edelstein, Borden, Pulaski,* and *Bleueri* cases cited and discussed above.

2. The Government Did Not Pay Appellee's Wages.

By statute, the operation of non-appropriated fund activities, including employees' wages, must be maintained and supported solely by funds derived through the operation of such activities. Appellee's wages were paid by the Cafeteria Association from funds obtained through the operation of the food service activities. Appellee does not understand the United States to contend the fact is otherwise.

3. The United States Does Not Have the Right or Authority to Dismiss Employees of a Non-Appropriated Fund Activity.

Appellant has the burden of proving the United States has the authority to dismiss appellee. (See discussion under

5, infra). It has failed to do so. In fact, it seems clear from reading C.N.P.I. 66 that such power is vested exclusively in the Cafeteria Association and its civilian manager.

4. The United States (a) Does Not Have the Right to Control the Means and Methods by Which Appellee (or the Cafeteria System) Performs His Work, and (b) Has Not Undertaken Its Burden of Proving that Such Right of Control Exists.

(a) A thorough examination of the cases reveals that in no case has a court reached the question of the right to control unless or until the necessary express or implied agreement has been first found to exist, which appellee has already shown does not exist in this case. Once it has been determined that such an agreement exists between the parties, then an essential element is the right of controlling the method and means, as well as the end result, by which the work is to be done. *Matcovich v. Anglim,* 134 F.2d 834 (9th Cir., 1943). In this connection it should be emphasized that the right of controlling the method and means of performance must be substantial. "It is established that where one is performing the work in which another is interested the latter may exercise a certain measure of control for a definite and restricted purpose without acquiring the responsibilities of an employer. Some such supervision is inherent * * *" *Los Angeles Athletic Club v. United States,* 54 F. Supp. 702, 706 (D.C. Cal., 1944).

It is obvious that appellant did not have the right to control the manner and method by which the Cafeteria System's employees performed their work. The Cafeteria System is charged with the duty of developing and executing the operation of the food service. C.N.P.I. 66 4-2a (Appellant's Brief page 23-24), although a regular naval officer serves in an ex-officio capacity. C.N.P.I. 66 § 4-2c (Appellant's Brief, page 24). However, this officer may only advise and assist

the Association, and act in a liaison capacity for the Navy. Thus, it is apparent that the naval regulations do not give the government the right to control the method and the means by which the work shall be performed. They confer only that inherent authority which is necessary to secure the proper performance of the end result—that of providing adequate food service for the activity. The law is clear that no employment relationship exists merely because the person for whom the services are being performed has the right to control the end result.

(b) It is appellee's position (1) that appellant has, with the exception of the regulations (C.N.P.I. 66), utterly failed to prove, as it had to duty to do, that the United States had the right to control the means and methods by which appellee performed his services, and (2) that no such control exists in fact.

Appellant's position in this case is analogous to that of a parent corporation seeking to persuade the court that an employee of a wholly or partially owned subsidiary is in fact the parent corporation's employee. Such an argument is, like appellant's here, entirely without merit. No court would accept such an argument and appellee respectfully urges that this court should not.

5. The Government Has Failed to Assume the Burden of Showing that an Employment Status Existed Between It and Appellee.

Although the plaintiff under the Federal Tort Claims Act has the burden of showing that *the tortfeasor was a government employee*, it is clear that *a plaintiff* under this Act *does not have to prove he is not a federal employee*. This is a matter of defense to be pleaded and proved by the defendant. *The record is barren of any attempt on the appellant's part to prove the existence of any of the four common* law elements constituting the employment relationship.

II. The District Court Properly Held That Under the Law of the State of California Liability Would Be Imposed on the United States if It Were a Private Person.

Appellant's specification of error number 3 (Appellant's Brief, page 4) is premised on the theory that the appellee is an employee of the United States. The government's argument rests on the fact that under the express terms of the Federal Tort Claims Act (28 U.S.C. 1346(b)) liability may be imposed on the United States only "if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred". And, if appellee is an employee of the United States, then under California law appellant would not have any liability to appellee apart from the Workmen's Compensation Act.

Since appellee has already demonstrated that he is not appellant's employee, specification of error number 3 must fall of its own weight. Appellee respectfully refers the court to those arguments and authorities cited under I, supra, in support of appellee's contention that he is not an employee of the United States.

III. Should This Court Conclude That Appellee Is a Federal Employee, He May Nevertheless Sue the United States Under the Federal Tort Claims Act.

A. THE DOCTRINE IS WELL SETTLED THAT A FEDERAL EMPLOYEE, BY VIRTUE OF THAT FACT ALONE, IS NOT PRECLUDED FROM SUIT UNDER THE TORT CLAIMS ACT IF THE INJURY "WAS NOT INCIDENT TO OR CAUSED BY" HIS EMPLOYMENT SERVICE.

It is appellee's contention that the clear unequivocal evidence in this case brings it squarely within the doctrine of *Brooks v. United States,* 337 U.S. 49 (1949).

In *Brooks* the plaintiffs, servicemen on leave, were injured on a public highway by the negligence of a government employee driving a government owned truck. The court held that the Federal Tort Claims Act provided a

remedy to servicemen "where the injury was not incident to or caused by their military service". *United States v. Brown,* 348 U.S. 110, 111 (1954). In the present case appellee testified without contradiction that the injury occurred *before* he actually reported for work (Transcript, pages 7-8). In seeking to establish the exact time of the accident, appellee was asked on direct examination, "(Had you) already gone into the kitchen to work?" (Transcript, page 7, line 23). Appellee answered "No." and "Not yet". Since the uncontroverted evidence shows that appellee was injured *before* commencing work for that day, *it is our position that his injury could not have been "incident to or caused by" his employment status.* The accident did not arise from anything connected with his duties as an employee. A case in point is *Knecht v. United States,* 144 F. Supp. 786 (E.D. Pa., 1956), where the court held that an airman killed when returning to his base from leave, was not killed "incident to service". The court held, under the authority of *Brooks v. United States,* 337 U.S. 49 (1949), that a claim for wrongful death would lie against the United States under the Federal Tort Claims Act. Thus, it is clear that where, as here, appellee was going to, but had not yet started nor reported for work, he can not be considered as injured "incident to" his employment.

B. EVEN THOUGH APPELLEE BE CONSIDERED AS A FEDERAL EMPLOYEE ABLE TO SUE UNDER THE TORT CLAIMS ACT, HE IS NOT AN EMPLOYEE WITHIN THE MEANING OF THE CALIFORNIA WORKMEN'S COMPENSATION ACT.

It is clear that a person may be considered as an employee under federal law but not an employee under state law. See *Matcovich v. Anglim,* 134 F.2d 834 (9th Cir., 1943), where the court held plaintiff to be an employer for purposes of federal law even though a California state court had previously held that he was not an employer under

state law. As appellee has already demonstrated under II, supra, it is clear that he would not be considered as an employee of the United States under California law. See also *Daniels v. Chanute Air Force Base Exchange,* 127 F. Supp. 920 (D.C. Ill., 1955), where the court declared that the existence of workmen's compensation coverage would not bar an action under the Tort Claims Act by an employee of a non-appropriated fund activity.

C. EMPLOYEES OF NON-APPROPRIATED FUND ACTIVITIES ARE NOT EMPLOYEES WITHIN THE MEANING OF THE FEDERAL TORT CLAIMS ACT.

The court is respectfully referred to the cases of *Comelin v. United States,* 177 F.2d 275 (5th Cir., 1949); *Daniels v. Chanute Air Force Base Exchange,* 127 F. Supp. 920 (D.C. Ill., 1955); and *Faleni v. United States,* 125 F. Supp. 920, discussed in I, A, supra.

IV. The Compensation Benefits Provided in 5 U.S.C. 150k-1 Are Not Appellee's Exclusive Remedy Against the United States.

In *Aubrey v. United States,* 254 F.2d 768 (D.C. Cir., 1958), the court relied on 5 U.S.C. 150k-1 in granting the government's motion for summary judgment against an employee of a non-appropriated fund activity. The court held that the employee was precluded from suing the United States under the Federal Tort Claims Act "by the principle . . . that the Act was not intended to grant the right to sue the government to one who has already been provided another remedy against its own instrumentality" (at page 772). The court reached this conclusion in order to effectuate the Congressional policy of providing "a system of 'simple, certain and uniform compensation for injuries or death'" (at page 772). However, in the *Aubrey* case the injury of which the employee complained occurred *subsequent* to the enactment of the statute. In the present case, appellee's injuries

occurred *prior* to the enactment of 5 U.S.C. 150k-1. Thus, at the time appellee's claim arose there was no complete, comprehensive Congressional system, as in *Aubrey,* for providing relief for injured employees of non-appropriated fund activities. Thus, *Aubrey* is inapplicable as the injury there arose after the passage of 5 U.S.C. 150k-1, while appellee's injury arose prior to the enactment. Further, it seems clear that Congress could not, nor did it intend said statute to operate retroactively to bar appellee's existing cause of action under the Federal Tort Claims Act.

CONCLUSION

For the foregoing reason, appellee respectfully submits that the judgment of the court below was proper and correct, and should therefore be affirmed.

Ernest E. Emmons, Jr.
Thomas M. Mulvihill
Attorneys for Appellee